No. 4355

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

CHARLES FORNI,

Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

H. S. YOUNG,
R. G. HUDSON,
FRANK T. O'NEILL,
PRESTON & DUNCAN,
Attorneys for Plaintiff in Error.

B. F. RABINOWITZ,
Of Counsel.

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I.

STATEMENT OF THE CASE.

The plaintiff in error was charged by information with violations of the National Prohibition Act. He was charged jointly with another defendant named George Blake, who, however, did not appear at the trial. The information contained two counts. The first count charged plaintiff in error and Blake with maintaining "a common nuisance in that the said defendants did then and there wrongfully and unlawfully keep for sale on the premises aforesaid, certain intoxicating liquor, to wit"; Then follows a description of certain quantities of liquor. The other count charged that the defendants "did then and there wrongfully and unlawfully possess cer-

tain intoxicating liquor, to wit": Then follows description of the same liquor. Both counts charge the crimes to have been committed on the 26th day of December, 1922, and both crimes are charged to have been committed at the same premises, namely No. 2933 Webster Street in the City and County of San Francisco.

The information was filed on the 21st day of March, 1923. The trial was had on April 10, 1924, and the jury convicted the plaintiff in error on both counts. The judge of the District Court on the 10th day of April, 1924, imposed a sentence upon the plaintiff in error that he "be imprisoned for the period of one year and pay a fine in the sum of $500.00 as to the first count; that he pay a fine in the sum of $500.00 as to the second count". And the sentence further provided that in default of the payment of said fines, that defendant be imprisoned untid said fines are paid or he be otherwise discharged in due course of law, and that his imprisonment should be in the county jail of the County of San Francisco. (See Tr. pp. 77-78.)

Prior to the filing of said information and on the 26th day of December, 1922, D. W. Rinckel, who was an agent of Samuel F. Rutter, Prohibition Director of the State of California, filed an affidavit before Thomas E. Hayden, U. S. Commissioner, in support of an application for a search warrant (Tr. pp. 49 and 50), and on the same day, said Commissioner issued a search warrant. (Tr. pp. 47 and 48.) The search warrant practically

copied the charging part of this affidavit, and authorizes the Federal Prohibition Director, or any of his deputies "to enter said premises at any time of the day or night, with the necessary and proper assistance, and forthwith search the same, if found, bringing before the undersigned, and to report and act concerning the same as required by you under law".

With this search warrant, the said Rinckel entered the premises and searched the same, and seized the liquor described in the information, and made his unverified return thereof to the Commissioner on the said 26th day of December, 1922. (See Tr. p. 49.) On March 13, 1923, Charles Forni, the plaintiff in error, filed in the District Court of the United States, his duly verified petition for a return to him of the personal property, consisting of liquors, which had been thus seized. (See Tr. pp. 9-15.) Upon filing this petition, an order to show cause was issued by the judge of that court, requiring the prohibition officer Rinckel to show cause before the court why the personal property should not be returned to the petitioner. An answer to this petition was filed by the United States District Attorney on the 21st day of March, 1923 (Tr. pp. 17-23), and at the same time, and as a part of said petition, there was filed with it the affidavit of the prohibition officer Rinckel, which appears at pages 19-22 of the transcript.

The plaintiff in error, in support of his petition for the return of the personal property, filed his

affidavit, which appears at pages 14 and 15 of the transcript. In the affidavit of the plaintiff in error it is stated that the premises from which the said personal property of which affiant was the owner was seized under the warrant, and taken, was the private dwelling house of the plaintiff in error and his brother, and that the same was used as a private dwelling house and for no other purpose, and that the said building and the said shed were within a common enclosure. That the officer Rinckel gained access to the premises by scaling a wall surrounding the same. The affidavit of the prohibition officer Rinckel stated that there was a building located at No. 2933 Webster Street, and that underneath the building is a garage which is disconnected from any other portion of the building "in that there is no ingress or egress therefrom to any other portion of the building, and that the main entrance into the said garage is on and from the said Webster Street".

It then proceeds to state that the affiant had reliable information that intoxicating liquor, to wit, whiskey, was stored, sold and delivered from the garage, and that on the 26th of December, 1922, they saw certain other liquors there in the shed on the same premises. That they secured a search warrant on that day and seized the liquors in question here. There is no statement in the affidavit of the prohibition agent that this place was not the residence of the plaintiff in error. The only inference along that line that can be made is from

his statement that there is no method of entering the garage from the building above except through the entrance on the street.

Upon this application for a return of the property, the court made an order denying the application. Thereafter and on the 7th day of April, 1924, which was prior to the trial of this action, the plaintiff in error here, filed his petition in the District Court to exclude from evidence the personal property so seized. He filed with this petition the affidavit of the plaintiff in error, stating that these premises constituted his private dwelling and that he was at the time of said search and seizure the owner thereof and that at the time of said search and seizure and for about three years prior thereto, the same was the private dwelling house of himself and his brother, and that they actually occupied the entire premises, including the garage. That the premises were never used for any business purpose, and that no sale of intoxicating liquor was ever made therein.

> "That the said premises consist of a certain two-story frame building and the basement thereof, and an outhouse or shed about thirty feet directly in the rear of said building, and which cannot be seen from said Webster Street. That said building and said shed are within a common enclosure."

It is further stated in the affidavit that Rinckel and his associate gained access by scaling a wall surrounding the premises, and also states that the

seizure was made, of course, against the consent and will of the plaintiff in error.

The defendant was called for trial on April 10, 1924. The Government, through the United States District Attorney, in answer to the petition to exclude the seized property as evidence, presented, in opposition thereto, its answer to the petition for the return of the personal property, filed a long time prior thereto, together with the affidavit of Rinckel made March 20, 1923, and used in opposition to the petition to return the property, and also the search warrant and affidavit on which it was based were introduced in evidence in opposition to the petition to exclude from evidence. On these documents, the judge of the District Court made an order denying the motion and petition of the plaintiff in error for the return of the property and the exclusion of the evidence. The plaintiff in error duly saved exceptions to these rulings of the court. (Ex. Nos. 1 & 2.)

Thereupon the trial of the plaintiff in error was immediately proceeded with. The only witnesses offered by the Government at the trial was the prohibition agent Rinckel who had made the search and seizure. He was asked by the Government as to the seizing of this property and to tell and relate what property it was he seized and took away. An objection to this was made by counsel for plaintiff in error on the ground that the evidence and information were illegal and unlawfully obtained. (Tr. p. 67.) The objection was overruled and the

witness was allowed to testify as to all the property which he had seized.

On the examination of the witness Rinckel, he testified that the place searched was

> "a dwelling house with a garage underneath and with outhouses which were all enclosed with fences. I climbed over the fence and I could see into the basement and see the wine barrels and bottles there, which were in the shed, from the adjoining yard, and I climbed over the fence and could see into the basement. I saw no liquor being sold there. It was reported to our office that they were taking liquor in and out of there all the time. The report came from a neighbor next door." (Tr. p. 69.)

The defendant thereupon produced as a witness one Enrico Besozzi, who testified that he was acquainted with the premises and knew them to be the residence of the plaintiff in error. The defendant also produced his brother, S. Forni, as a witness, who was being interrogated about the premises and as to whether the same was the private residence of the plaintiff in error, when the court stopped the counsel for plaintiff in error, saying:

> "This is all covered by the affidavit. What has this to do with the case before the jury?
>
> Mr. O'Neill. It is our contention that this was taken from the private home of the defendant.
>
> The Court. The point has been ruled on and against you. *I will allow no testimony on that matter.* The jury has nothing to do with the question of the search warrant. They are to determine the facts. That is a question of law."

To this ruling counsel for the plaintiff in error duly excepted. (No. 9, Tr. p. 72.)

Various other rulings were made by the court which need not be detailed here which were excepted to by counsel for plaintiff in error, but will be referred to later on.

Argument was waived by the respective counsel, and the court proceeded to instruct the jury. (Tr. p. 73.) The court first instructed the jury that the defendant is presumed to be innocent until he is proven guilty to a moral certainty and beyond a reasonable doubt, and called attention to the fact that the defendant had not taken the stand in his own behalf and that they were not to take this against him in any manner, and then the court instructed the jury as follows:

> "In this particular case, the information contains two counts or charges. The first count or charge is that he had in his possession certain alcoholic liquors which have been described to you here, for the purpose of sale. In order to find him guilty on the first count, you must not only find he had the liquor there, but that he had it there for the purpose of sale; and in determining that, you are entitled to take into consideration the fact, if you find it to be a fact, the testimony of the witness Rinckel, that he has been arrested as a bootlegger before. Furthermore, you are instructed that, under the Prohibition law, the possession of liquor, intoxicating liquor, establishes a presumption that it is kept for sale, and the burden of the case is on the defendant to show that it was not kept there for sale.

> As to the second count: If you should find he was in possession of the liquor, you must find him guilty on that count."

The defendant requested the court to give the following instructions:

> "If the premises in question were used and occupied by defendant as a private dwelling, to justify a verdict of guilty, you must find from the evidence, either that it was being used for the unlawful sale of intoxicating liquors or that it was used in part for some business purpose."

This instruction was refused by the court, and the refusal was excepted to by counsel for plaintiff in error.

The counsel for plaintiff in error requested the court to give an instruction defining the term "private dwelling" as follows:

> "The term 'private dwelling' includes the entire frame building in which the dweller resides, as well as all buildings and outhouses situated within the common enclosure, provided that the same are used solely for the comfort and convenience of the dweller and are not used for any business purposes."

This instruction was refused by the court and an exception saved to the ruling by counsel for plaintiff in error. (Tr. p. 74.) The case was submitted to the jury, which found the plaintiff in error here guilty as before stated.

II.

THE JUDGMENT OF CONVICTION HEREIN MUST BE REVERSED BECAUSE OF TWO FUNDAMENTAL ERRORS, SERIOUSLY PREJUDICING THE RIGHTS GUARANTEED BY THE CONSTITUTION.

Our position in brief is as follows:

A.

The only evidence adduced at the trial was evidence procured by the government in violation of the rights guaranteed to the plaintiff in error by the Fourth and Fifth Amendments to the Federal Constitution through the illegal issuance of a search warrant and the consequent invasion of his home and the seizure therein, under such void search warrant, of personal property lawfully in his possession.

B.

That in addition to the above underlying objection to all evidence adduced at the trial the court permitted inquiries as to previous *arrests* of the plaintiff in error in violation of well settled rules of evidence and such evidence resulted in a serious miscarriage of justice.

Preliminary to a consideration of the objection first above noted we take it to be the conceded law obtaining in all Federal courts that in the face of an objection seasonably made, evidence illegally seized or obtained will not be admitted against a defendant in a criminal case.

Such is the rule established by

Boyd v. United States, 116 U. S. 616; 29 L. Ed. 746;

Weeks v. United States, 232 U. S. 383; 58 L. Ed. 652;

Gouled v. United States, 255 U. S. 398; 65 L. Ed. 647;

Amos v. United States, 255 U. S. 313; 65 L. Ed. 654.

III.

THE SEARCH WARRANT WAS ILLEGALLY ISSUED AND NO EVIDENCE SECURED THROUGH THE ILLEGAL SEARCH COULD BE USED AGAINST THE DEFENDANT.

An examination of the transcript will disclose that the only evidence as to intoxicating liquor in the possession of the plaintiff in error was given by Mr. Rinckel, an agent of the Prohibition Director, and consisted of an itemization of the liquor seized by him under a search warrant. (Tr. pp. 67-69.) If, therefore, the search warrant was illegally issued or improperly executed, in view of the motions properly made to return the property seized and to exclude all evidence secured in connection with said seizures, then this testimony was not properly before the jury and there being no other testimony whatsoever in addition thereto the verdict of the jury cannot stand.

The statutes governing the issuance of search warrants pertinent to this discussion are:

"A search warrant may issue as provided in Title XI of Public Law, No. 24 of the 65th Congress approved June 15, 1917 * * *."

(Sec. 25 of Title II of the National Prohibition Act (41 C. 315).)

The act referred to provides, Sec. 3:

"A search warrant cannot be issued but upon probable cause supported by affidavit naming or describing the person and particularly describing the property in the place to be searched."

Sec. 4 provides:

"The judge or commissioner must before issuing the warrant examine on oath the complainant and any witness he may produce and require their affidavits or take their depositions in writing and cause them to be subscribed by the parties making oath."

Sec. 5 reads:

"The affidavits or depositions must set forth the facts tending to establish the grounds of the application or principal cause for believing that they exist."

Sec. 25 of Title II of the National Prohibition Act further provides:

"No search warrant shall issue to search any private dwelling occupied as such unless it is being used for the unlawful sale of intoxicating liquor or unless it is in part used for some business purpose such as a store, shop, saloon, restaurant, hotel or boarding house."

The affidavit on which the search warrant was issued in the instant case is as follows:

"On this 26th day of December, 1922, before me, Thomas E. Hayden, a United States Commissioner for the Northern District of California, Southern Division, personally appeared D. W. Rinckel, who, being by me first duly sworn did depose and say:

That he has reason to believe, and does believe, that within a certain house, store, building, or other place, in this Northern District of California, to wit:

A certain basement garage at No. 2933 Webster Street, San Francisco, Calif., and an outhouse or shed on same lot in the rear, being the premises of parties unknown, there is located certain property, to wit, illicit liquors, which is being used as the means of committing a felony, to wit: a violation of the National Prohibition Act of the statutes of the United States; that the facts tending to establish the grounds of this application, and the probable cause of deponent believing that such facts exist are as follows:

That this affiant on the 26th day of December, 1922, visited said premises and saw quantities of liquors, without evidence of tax being paid; that affiant has been informed that liquors are taken to and from said garage, both night and day; that affiant has reason to believe from said information and from inspection of the said garage that liquors in excess of ½ per cent alcohol illegally acquired, are stored and traded in from this garage.

(Signed) D. W. Rinckel.

Sworn to before me this 26th day of December, 1922."

We submit that under the statutes above set forth said affidavit was fatally defective and no search warrant could properly issue on the basis thereof for the following reasons:

(a) The affidavit is based on hearsay, information and belief and conclusions and contains no averment of a single fact, on the basis of which any reasonable cause for believing an offense against the Prohibition Act was being committed could be predicated.

(b) The premises to be searched, as appears from the affidavit itself, consisted of a private residence and there is no allegation of any facts warranting a belief that a sale of liquor had been made therein.

Sec. 25 of Title II of the National Prohibition Act quoted above provides that no search warrant shall issue for the search of a private dwelling occupied as such in the absence of sufficient evidence that the same is being used for the sale of liquor therein.

The affidavit in support of the search warrant designates the premises to be searched as

> "a certain basement garage at No. 2933 Webster Street, San Francisco, Calif., and an outhouse or shed on same lot in the rear."

The petition of the plaintiff in error to exclude evidence avers that the petitioner resided on the premises known as No. 2933 Webster Street; that the garage consisted of the basement of said dwell-

ing house and that the shed was within a common enclosure containing both said shed and said building.

The petition for return of personal property on behalf of plaintiff in error repeats the same allegation and in this connection the affidavit of the prohibition agent Rinckel in opposition to said petitions declares:

> "That there is, and at all of the times herein mentioned was a building located at No. 2933 Webster Street in said City and County of San Francisco; that underneath the said building there is a garage which is disconnected from any other portion of the building in that there is no ingress or egress, therefrom, to any other portion of the building; and that the main entrance into the said garage is on and from the said Webster Street."

The issue clearly then is whether a garage underneath a building occupied exclusively as a private dwelling but which is disconnected from any other portion of the building in that the only entrance to said garage is from the street, deprives said garage of the protection afforded by Sec. 25 of Title II of the Prohibition Act, quoted above, and whether a shed within a common enclosure with a private dwelling house and adjacent thereto and used for the storage of an automobile and personal effects such as furniture, clothing and pictures (Tr. p. 39), was not likewise within the protection of said section.

There is no necessity to multiply authorities on this point. This court has recently in the case of

Temperani v. United States, 299 Fed. 299,

declared under identical circumstances that such a garage constituted a part of the private dwelling of the defendant and was entitled to all the protection and all the immunities from search and seizure guaranteed by the Fourth and Fifth Amendments to the Federal Constitution and by Sec. 25 of Title II of the National Prohibition Act.

It furthermore quoted with full approval and inferentially adopted as a rule to be applied in this circuit the holding of the court in

Bare v. Commonwealth, 122 Va. 783, 94 S. E. 168.

This case under a parallel liquor law held that the term "dwelling house" had the same significance as at common law, that a long line of authorities had established "dwelling house" as being synonymous with "mansion house" and as including both the main dwelling and all that cluster of buildings surrounded by a common enclosure and embraced within the term "curtilage". It, therefore, necessarily would include the shed in the instant case which is conceded by the Government to have been an adjunct of the private dwelling of the plaintiff in error and surrounded by a common enclosure.

The same rule appears in

Keefe v. Clark, 287 Fed. 372,

at page 373, where the court says:

> "The place where the liquor was stored was partitioned off and could be entered through a locked door, the keys of which were held by

> Keefe. It was regarded as his personal storeroom, forming a part of the apartment which constituted his private dwelling within the meaning of Sec. 25, Title II of the Act."

In

United States v. Slusser, 270 Fed. 818,

at page 819, the court said:

> "The right of the people to be secure in their house and effects against unreasonable searches and seizures is not limited to dwelling houses but extends to a garage used as this was personally and for hire."

By necessary implication

United States v. Kelih, 272 Fed. 484, and

United States v. Bonner, 285 Fed. 293,

hold that a cellar is part of the dwelling house. So it is held in

State v. Blumenthal, 203 S. W. 36,

that burning barn and outhouse even though not contiguous to a main dwelling is arson.

So in

Pitcher v. People, 16 Mich. 142,

it was held that a barn is a part of a dwelling house as used in burglary statutes.

So in

Daniels v. Commonwealth, 4 S. W. 812,

it was held that all buildings within the same common enclosure and used by the same family are considered as parcel of the mansion.

To the same effect are

Devoe v. Commonwealth, 44 Mass. 316;
Mitchell v. Commonwealth, 11 S. W. (Ky.) 209.

These citations could be multiplied indefinitely but in view of the expressed opinion of this court in the Temporani case and its full approval of the statement of the law contained in *Bare v. Commonwealth,* supra, we conceive that no further argument or citation of authority is necessary to establish the proposition that the garage and the shed on the property of plaintiff in error surrounded by a common fence and used exclusively by Forni as a dwelling house for a period over three years prior to the warrant issued herein constituted the same a part of his private dwelling and subject to search only on the production of an affidavit containing facts giving rise to a reasonable belief that a sale of liquor had been made therein.

As respects the shed regardless of whether it be considered a part of the dwelling house or not the affidavit is fatally defective. It merely avers that affiant saw therein

> "quantities of liquors without evidence of tax being paid."

It does not aver that the liquor is intoxicating; it does not aver therefore that the liquor was subject to tax, although that would be here immaterial, nor does it aver that in fact the tax was not paid; *non constat* the liquor may have been water. That

an indictment charging one with unlawful possession of liquor and failing to declare that it is intoxicating is defective is held in

United States v. Boasberg, 283 Fed. 311.

Assuming, however, that the shed is a part of the dwelling house, there is not even an attempt to aver that any sale of any liquor was made therein. Therefore, under no circumstances could a warrant for the search of said shed and seizure of any property therein for violation of the Prohibition Act properly issue.

As respects the garage the affidavit charges

> "that affiant has been informed that liquors are taken to and from said garage, both night and day; that affiant has reason to believe from said information and from inspection of the said garage that liquors in excess of ½ per cent alcohol illegally acquired are stored and traded in from this garage."

We submit respectfully that the above consists solely of hearsay, information and belief, and conclusion, and does not contain one single fact required by Sec. 5 quoted hereinabove as a necessary basis for a search warrant.

The law is well established in the Federal courts that while the facts required to be contained in an affidavit of this nature need not be such as would insure a conviction in a subsequent trial, nevertheless they must be facts personally known to the affiant and competent to be testified to by him as a

witness on the trial of the case. One of the leading cases on this subject is

Ripper v. United States, 178 Fed. 24.

Here the affidavit stated that the affiant had good reason to believe and did believe that the accused was unlawfully engaged in the business of manufacturing oleomargarine, with intent to defraud the United States. In holding that this affidavit was defective and that evidence secured on a search based on a warrant issued thereon was inadmissible, the court said:

> "The affidavit on which the warrant was issued set forth no facts from which the existence of probable cause could be determined, nor did the warrant itself recite the existence of such cause. * * * The oath in writing should state the facts from which the officer issuing the warrant may determine the existence of probable cause or there should be a hearing by him with that purpose in view. The immunity guaranteed by the constitution should not be lightly set aside by a mere declaration of a non-judicial officer that he has reason to believe and does believe, etc. The undisclosed reason may fall far short of probable cause."

In

Veeder v. United States, 252 Fed. 414,

writ of certiorari denied, the court says, stating the above general rules:

> "No search warrant shall be issued unless the judge has first been furnished with facts under oath—not suspicions, beliefs, or surmises, but facts—which, when the law is properly applied to them tend to establish the necessary legal con-

clusion or facts which, when the law is properly applied to them, tend to establish probable cause for believing that the legal conclusion is right. The inviolability of the accused's home is to be determined by the facts, not by the rumor, suspicion, or guesswork. If the facts afford the legal basis for the search warrant, the accused must take the consequences. But equally there must be consequences for the accurer to face. If the sworn accusation is based on fiction, the accuser must take the chance of punishment for perjury. Hence the necessity of a sworn statement of facts, because one cannot be convicted of perjury for having a belief, though the belief be utterly unfounded in fact and law. The finding of the legal conclusion or of probable cause from the exhibited facts is a judicial function, and it cannot be delegated by the judge to the accuser."

Applying these principles to McIsaac's affidavit we observe that not a single *statement of fact* is verified by his oath. All he swears to is that he has good reason to believe and does verily believe so and so. He does not swear that so and so are true. He does not say why he believes; he gives no facts or circumstances to which the Judge could apply the legal standard and decide that there was probable cause for the affiant's belief. There is nothing but the affiant's application of his own undisclosed notion of the law to an undisclosed state of facts and under our system of government the accuser is not permited to be also the Judge."

In

United States v. Ray and Schultz, 275 Fed. 1004,

the affidavit in question read that affiant

"has good reason to believe that in and upon * * * a fraud upon the Government of the

> United States has been and is being committed, that is to say, that the said J. W. Beaton and John Doe * * * are engaged in the unlawful sale and possession of intoxicating liquors * * *."

The court in holding such an affidavit insufficient declared, p. 1006:

> "It is, of course, entirely clear that under the constitutional as well as the statutory provisions thus applicable the sufficiency and validity of the search warrant under consideration must be tested and determined by the result of the inquiry whether it was based upon a sworn statement of facts tending to show probable cause for the belief that proper grounds for the issuance of such search warrant existed or whether on the other hand the latter was based merely upon statements, although sworn to, of *belief*."

Almost identical with the affidavit in the instant case is that in

United States v. Harnich, 289 Fed. 257,

where the affidavit reads:

> "Through investigations made by him and information he has obtained he has reason to know and believe and does therefore know, believe and aver that the National Prohibition Act is being violated by the use of a part of certain premises * * * for the making, secreting and selling of whisky, gin, beer or other kinds of intoxicating liquors for beverage purposes * * *."

In holding this affidavit wholly insufficient the court says (p. 261):

> "It is thus perfectly apparent that no *facts* whatever are set forth tending to establish the

> grounds of the application or probable cause for believing that they exist and no facts are alleged which justify the conclusion of law that the National Prohibition Act has been violated, nor are they sufficient to justify the issuance of a search warrant."

In

Giles v. United States, 284 Fed. 208,

the affidavit merely declared that Giles was violating the National Prohibition Act by having illegal possession of intoxicating liquors at his drug store. The court held this wholly insufficient, and declared that had the affiant been called as a witness (p. 214),

> "he would have been required to state what he saw or heard or smelled or tasted; that is to give evidence on which the jury under instructions of the court could determine both as to the possession of liquor, as to whether it was intoxicating liquor and as to whether possession of it was legal or illegal. The fact that Lordan's affidavit was not in form on information and belief and that he bravely swore that Giles had illegal possession of intoxicating liquor does not make his statement legal evidence of fact. It is not enough that the form of this affidavit that the affiant *might* have personal knowledge as to the possession of intoxicating liquor and as to facts tending to show that such possession was illegal. It should have affirmatively appeared that he had personal knowledge of facts competent for a jury and the facts, and not his conclusion from the facts, should have been before the commissioner."

In

United States v. Kaplan, 286 Fed. 963,

the court declares, discussing the nature of the facts which the affidavit must contain (p. 969):

> "Furthermore the evidence must be such 'as would be admissible upon the trial of a case before a jury.' * * * As illustrative of this such evidence used as the basis of a warrant has been animadverted on as 'merely hearsay information' * * *. 'The finding of the legal conclusion or of probable cause from the exhibited facts is a judicial function and it cannot be delegated by the Judge to the accuser'."

In

United States v. Kelih, supra,

the court declares (p. 488),

> "If it (search warrant) was issued on the showing made by the affidavit of Mr. Kiggins 'that a violation of the National Prohibition Act has been committed and affiant states that he has reason to believe that there are illegally manufactured liquors and an illicit still now concealed in or on the premises,' etc., is insufficient of itself to warrant the judicial officer to find that a violation of the National Prohibition Act has been in fact committed. The witness attempts to find the ultimate fact which must be ascertained by the officer authorizing the issuance of the warrant."

In

United States v. Dziadus, 289 Fed. 837,

the affidavit on which the warrant was based for the search of the residence of the defendant declared:

> "* * * is as I have reason to believe and do believe from reliable information, and by

> further reason of the fact that said place was raided in August, 1922, and a still found being used for the purpose of unlawful storing, possessing, keeping and selling intoxicating liquor."

In holding this wholly insufficient the court declares (p. 840):

> "The provisions of the statute are plain. No warrant shall issue to search any private dwelling unless facts are adduced before the commissioner tending to establish that it is being used for the unlawful sale of intoxicating liquor and no warrant shall issue for houses used for other purposes than dwellings unless facts tending to establish probable cause of believing the law is being violated are reduced to writing and sworn to before the officer issuing the writ. Affidavits of search warrants based on information and belief alone are wholly insufficient for a basis of issuing such warrants (cite cases). No search warrant shall issue based upon suspicion, belief, rumors or surmises (cite cases)."

See also in this connection:

United States v. Armstrong, 257 Fed. 506;

United States v. Kelly, 277 Fed. 485;

Salata v. United States, 286 Fed. 125;

Central Consumers Co. v. James, 278 Fed. 249;

United States v. Ilig, 288 Fed. 939;

Jozwich v. United States, 288 Fed. 831;

United States v. Borkowski, 268 Fed. 408;

United States v. Pitotto, 267 Fed. 603;

United States v. Rykowski, 267 Fed. 866.

In the only case in this Circuit in which the question whether information received from a third party, whose identity is not disclosed in the affidavit, is sufficient to authorize the issuance of a warrant (*Vachina v. United States,* 283 Fed. 35), the question is expressly not passed on. However, the above citation of authority at perhaps unnecessary length lays down what is undoubtedly the overwhelming weight of authority as well as the sound rule to be followed and we apprehend that this court will likewise subscribe thereto.

Applying the rules above set forth to the affidavit of D. W. Rinckel in the instant case, we have hereinabove seen that there are no allegations whatever in respect to the shed save that affiant saw quantities of liquor therein. Certainly not a fact raising or warranting a reasonable belief that a crime was being committed.

As respects the garage the affidavit (Tr. p. 50) declares:

> "that affiant has been informed that liquors are taken to and from said garage, both night and day."

Under all of the cases above cited this is pure hearsay, not a fact within the personal knowledge of affiant and hence not a basis for the issuance of a warrant.

The affidavit concludes:

> "that affiant has reason to believe from said information and from inspection of said garage that liquors in excess of ½ per cent alcohol

illegally acquired are stored and traded in from this garage.''

Again applying the rule of the above cases: So much of this averment as is based on information is clearly not a statement of a fact. As to the balance thereof, we respectfully urge that a declaration that from the inspection of said garage affiant has reason to believe that liquors are traded from said garage and that said liquors contain in excess of ½ per cent alcohol and are illegally acquired are pure conclusions of the affiant and contain no single statement of fact. It is inconceivable that from a mere inspection of the garage from the outside that the affiant could determine that liquors were traded from said garage. Disregarding the additional feature that there is no averment of a sale therein, in *haec verba,* there is no fact disclosed on the basis of which the officer issuing the warrant could reach the conclusion that the liquor was intoxicating; that it was illegally acquired or that it was being sold. Theoretically such may have been the case, and theoretically affiant may have had facts within his personal knowledge justifying such conclusions, but the affidavit is barren thereof.

Even conceding that the affiant may be considered to have averred facts showing the possession of liquor in the garage it certainly cannot be claimed that there is a single fact showing a sale.

The necessary conclusion from the authorities cited above as applied to the affidavit herein is that

the warrant authorizing the search of the premises of the plaintiff in error should not have been issued, and therefore, no evidence acquired through the search and seizure could be introduced at the trial of the plaintiff in error.

The only evidence at the trial in regard to the possession of liquor by the defendant was the testimony of Rinckel that he had seized certain enumerated liquors, and the only witness for the Government conceded (Tr. p. 69) that he never saw liquor being sold on the premises. Such being the case and the plaintiff in error having made seasonable application for the return of the seized property, its exclusion as evidence and the exclusion of all information obtained through the illegal search, and having preserved his rights by proper exceptions (Nos. 1, 2, and 6) there is absolutely no evidence to support a conviction of the plaintiff in error either on the charge of unlawful possession of liquor or on the charge of maintaining a nuisance involving the possession of liquor for the purpose of sale.

The return on the search warrant (Tr. pp. 62, 63) does not appear to be verified, nor does it appear therefrom that a copy of the warrant together with a receipt for the property taken was given to the person from whom the property was taken as required by Sec. 12 of Title XI of the Espionage Act, 40 Stat. 228. Such a failure in view of the clear requirements of the statute was held by the Circuit Court of Appeals for the First Circuit in *Giles v.*

United States (supra), to render the search and seizure illegal and prevent the use at the trial of any evidence or information secured therein. The same rule was subsequently reiterated in the case of

Murby v. United States, 293 Fed. 849,

and for this additional reason the search and seizure in the instant case were illegal and no evidence secured thereunder could be properly introduced at the trial of the plaintiff in error.

IV.

THE SEARCH WARRANT HAVING BEEN ILLEGALLY ISSUED THE LIQUOR SEIZED THEREUNDER SHOULD HAVE BEEN RETURNED.

Exceptions 1 and 2 were taken to the order of the court denying petitions respectively to return personal property (Tr. p. 51), and for the return of personal property and exclusion of evidence. (Tr. p. 64.) In so far as the motion for return of personal property illegally seized is concerned we desire at the outset to concede that there is a conflict of opinion in the various Circuits as to whether it automatically follows that property illegally seized must be returned without a showing on the part of the applicant for its return that he was lawfully in possession at the time of seizure. To this effect are:

United States v. Kaplan, 286 Fed. 963;
United States v. Jensen, 291 Fed. 668;
United States v. Dowd, 273 Fed. 600;
United States v. Alexander, 278 Fed. 308;

United States v. Rykowski, 267 Fed. 866;
United States v. Dziadus, 289 Fed. 837;
Haywood v. United States, 268 Fed. 795;
Voohries v. United States, 299 Fed. 275.

Some of the above cases involve stills and other articles employed in the illegal manufacture of liquor which under no circumstances can be lawful subject of property.

United States v. Rykowski, and
Haywood v. United States, supra.

Some are based on the failure of the petitioner to allege that he was the owner of the property seized as in *Voohries v. United States,* supra. The others flatly affirm that adirect obligation is cast on the petitioner by the Prohibition Act to demonstrate his right to possess the liquor as a condition precedent to its return.

The weight of authority and, in our opinion, the sounder rule is that where a warrant has been illegally issued, all proceedings thereunder are void and the parties must be restored to their original status. This should be particularly true in the case of liquor illegally seized from a private dwelling wherein the statute expressly declares it may be lawfully possessed. To this effect see:

Godat v. McCarthy, 283 Fed. 689;
United States v. Harnich, 289 Fed. 256;
United States v. Kelih, 272 Fed. 484;
United States v. Ray and Schultz, 275 Fed. 1004;

Keefe v. Clark, 287 Fed. 372;
United States v. Sievers, 292 Fed. 394;
United States v. Quantity of Intoxicating Liquor, 289 Fed. 278;
United States v. Vigneaux, 288 Fed. 977;
United States v. Boasberg, 283 Fed. 311;
United States v. Descy, 284 Fed. 724, and
Connely v. United States, 275 Fed. 509,

where the court stated the general rule as follows (p. 511):

"The contention of the Government is that although the seizure may be unlawful yet intoxicating liquors are contraband and under no circumstances should they be returned even though it is impossible to use them as evidence against the accused. The mere possession of intoxicating liquors in a private dwelling house if acquired before the date when the Volstead Act took effect is not unlawful. The National Prohibition Enforcement Act, Sec. 33: Street v. Lincoln Safe Deposit Co., 255 U. S. 88, 41 Sup. Ct. 31, 65 L. Ed. There is nothing to indicate when the liquor was acquired and as was stated in the Street case by Mr. Justice Clark: 'An intention to confiscate private property even in intoxicating liquors will not be raised by inference and construction from provisions of law which have ample field for their operation in effecting a purpose clearly indicated and declared'."

"If the seized property could not possibly be lawfully in the possession of the accused such as an illicit still (*U. S. v. Rykowski,* D. C. 267 Fed. 866), stolen goods, smuggled goods, implements of crime (*Haywood v. U. S.,* C. C. A. 268 Fed. 795, 803) and the like, then resistance to a motion to impound would be of little avail.

> However, the Government cannot call upon the accused to explain the possession under the provisions of Sec. 33 of the Volstead Act under the circumstances of this case as the possession may be upon an hypothesis just as consistent with innocence as it would be with guilt, a forfeiture should not result. The property unlawfully taken from the possession of the petitioner without a search warrant must be restored."

Finally, in this connection we desire to call this court's attention to the case of

United States v. Mitchell, 274 Fed. 128,

where in an analogous case in an illegal search of a private dwelling under an affidavit insufficiently charging a sale of intoxicating liquor, Judge Dooling lays down clearly the rule regarding the issuance of a warrant in this case as follows (p. 130):

> "The National Prohibition Act further provides that no search warrant shall issue to search any private dwelling occupied as such unless it is being used for the unlawful sale of intoxicating liquor or is in part used for some business purpose. It should not be difficult to keep within these provisions. If in the attempted enforcement of the Prohibition law a search warrant is applied for the first inquiry of the Judge or commissioner should be as to the character of the place to be searched. If it be a private dwelling, then the inquiry should be 'What evidence have you that this place is being used for the unlawful sale of intoxicating liquor.'
>
> If the officer has no such evidence he should not apply for the warrant or if the Judge or commissioner is not satisfied with the evidence that he should not issue it. If the officer is act-

> ing upon information he should lay all the facts before the Judge or commissioner with the names of the persons from whom this information is received."

The same not having been done, as of course, the court ordered that the property be restored to the petitioner.

It is only necessary to add that in the instant case the petitions of the plaintiff in error for the return of the property and the exclusion of evidence obtained at the search alleged that he was then and at all times mentioned therein the owner of and entitled to the immediate possession of the described personal property.

From the foregoing we submit that if this court considers our objection to the form and contents of the affidavit valid and that the search warrant improperly issued thereon and that the liquor was illegally seized, then the plaintiff in error is entitled to its immediate and automatic restoration.

V.

THERE WAS NO COMPETENT EVIDENCE THAT THE LIQUOR SEIZED WAS INTOXICATING.

The seventh assignment of error (Tr. p. 83) and exceptions 7 and 8 (Tr. pp. 68-69) both refer to the admission of evidence on the part of the witness for the United States as to the intoxicating nature of the liquor seized. The objection was based on the

ground that the questions called for the conclusion of the witness and that no foundation had been laid warranting the admission of his opinion.

We understand in this connection and concede that the rule is well established that a chemical analysis by an expert need not be made in order to demonstrate that the liquor is intoxicating. We understand that the testimony of any competent person who has had experience in connection with liquors may constitute satisfactory proof. Where the witness has had opportunity to taste the liquor, to smell the liquor, to witness its effect on persons imbibing it, or where the liquid is purchased as wine, whisky, beer or under any other designation connoting intoxicating liquor or where the price paid for it indicates its nature, we concede that evidence of such facts will supply the foundation entitling the person individually cognizant thereof to testify. We understand that the following cases go no further than the above rule:

Singer v. United States, 278 Fed. 415;
Heitler v. United States, 280 Fed. 703;
Pennacchio v. United States, 263 Fed. 66;
Strada v. United States, 281 Fed. 143,

and similar cases.

However, we do not feel that a person who has qualified merely by having seen some liquor in a bottle, so far as the records show, unlabelled and at a considerable distance without evidence of a nature indicated as above is properly qualified to testify as

to its intoxicating qualities or as to its alcoholic percentage.

We respectfully submit that the true rule as to the qualification of an ordinary non-expert witness is contained in:

Re Liquor Seized, 197 N. Y. Supp. 758.

Here the testimony was that the affiant

"Saw intoxicating liquors sold."

(p. 760):

"We are confronted with a more serious question, however, when we assume as a naked fact that the complainant could see that the drinks were drinks of liquor and that such liquor was unlawfully intoxicating. Surely he could not, by simply looking at the liquid, judge that it was intoxicating liquor. That would be incredible. If he saw other things, heard other things, smelled of the liquor or of the breaths of the drinkers, tasted of the liquor himself, or sensed any circumstances whereby he confirmed his own conclusion that it was intoxicating liquor, the complainant is silent in his complaint as to such facts and circumstances."

(p. 761):

"* * * but when he concludes that the drink was intoxicating, without saying how he knows the fact, beyond saying that he saw it, it is equally plain that his statement is a conclusion from the facts unrevealed, which he could have stated, and which might have been the single incredible deduction that it looked like intoxicating liquor. Science has not yet progressed to the point where such a deduction can be drawn through the mere sense of sight of the liquor itself."

For the foregoing reasons we submit that the objection of counsel to the admission of such purely opinion evidence was sound and that in the absence of further qualification of the witness his testimony in this respect should have been excluded.

VI.

THE COURT ERRED IN EXCLUDING EVIDENCE AS TO THE CHARACTER OF THE PREMISES OCCUPIED BY THE PLAINTIFF IN ERROR AND IN REFUSING TO GIVE INSTRUCTIONS REQUESTED.

The specifications of error 8, 9 and 10 and exceptions 9, 10 and 11, may be considered jointly. They refer to the refusal of the court to permit evidence as to the character of the premises occupied by plaintiff in error and its refusal to give the requested instructions defining the term "private dwelling" and instructing the jury that if the premises occupied by the plaintiff in error constituted a private dwelling they must, to justify a verdict of guilt, find from the evidence either that the premises were being used for the unlawful sale of intoxicating liquors or that it was used in part for some business purpose. We concede that whether or not the premises constituted a private dwelling was a question of law. Nevertheless, in view of the fact that the possession of intoxicating liquors in a private dwelling is expressly authorized by the Volstead Act, and in view of the fact that there was some evidence before the jury given by the witness

for the Government, as to the character of the premises (Tr. p. 69) it was the duty of the court to instruct the jury, if such were the law, that these premises constituted a private dwelling. Moreover, as regards the nuisance count, while we concede that a private home may constitute a nuisance equally with a business office or premises, nevertheless, the possession of liquor in a private home might not in the eyes of the jury give rise to the same inference and presumptions in regard to the purpose for which it is kept as would the possession of the same liquor under other circumstances. For this reason also the refusal of the court to give the instructions requested was error seriously prejudicing the rights of the plaintiff in error.

VII.

THE ADMISSION OF EVIDENCE CONCERNING PRIOR ARRESTS AND THE INSTRUCTION THAT SUCH EVIDENCE WAS COMPETENT TO PROVE THAT LIQUOR WAS KEPT FOR THE PURPOSE OF SALE WAS PREJUDICIAL ERROR REQUIRING A REVERSAL.

Over the objection of counsel for plaintiff in error the witness Rinckel was permitted to testify that Forni had been *arrested* by him several times (Tr. p. 65) and that "I *arrested* him four or five times". (Tr. p. 66.)

The objection was based on the ground that the evidence was incompetent, irrelevant and immaterial and that the plaintiff in error was charged only with

the particular offence for which he was on trial. The court overruled the objection on the ground that evidence of previous offenses are admissible where the charge is that of maintaining a nuisance involving the keeping for sale of intoxicating liquor, and our exception No. 3 was taken to such ruling (Tr. p. 65).

Subsequently the court on its own initiative inquired of the witness (Tr. p. 70):

> "Q. You have made *arrest* of this man for violation of the Prohibition law before?
> A. Yes, sir, for bootlegging, he was what is known as 'Slim's Fly Trap Restaurant' there."

The court in its instruction stated (Tr. p. 73):

> "In order to find him guilty on the first count you must not only find that he had liquor there but that he had it there for the purposes of sale; and in determining that you are entitled to take into consideration the fact, if you find it to be a fact the testimony of the witness Rinckel, that he has been *arrested* as a bootlegger before."

We respectfully submit that the ruling of the court on the admission of the evidence above quoted and the instruction thereon, was error seriously prejudicing the right of the plaintiff in error and entitling him to a new trial.

(a) We first desire to point out that Forni never took the stand. Therefore, whatever may be the rule in regard to such evidence by way of impeaching a witness is not here relevant. The evidence being admissible at all was pertinent on only one

theory, i. e., as evidence tending to prove the commission of the offenses for which the plaintiff in error was on trial.

The general rule supported by an unbroken line of authorities in the Federal courts is that proof of collateral offenses is not admissible against the defendant since it merely tends to divert the attention of the jury or the court from the main issue before it or to prejudice the defendant and secure his conviction on the general principle that he is an undesirable person and, therefore, likely to have committed the offense with which he is charged.

The leading case on this subject is

Boyd v. United States, 142 U. S. 454 (35 L. Ed. 1077),

where in reversing the judgment of conviction on the charge of murder on the ground that the court had admitted evidence, tending to show that the prisoner had committed other robberies shortly before the time when the killing took place, the court said:

> "They were collateral to the issue to be tried. No notice was given by the indictment of the purpose of the government to introduce proof of them. They afforded no legal presumption or inference as to the particular crime charged. Those robberies may have been committed by the defendants in March, and yet they may have been innocent of the murder of Dansby in April. Proof of them only tended to prejudice the defendants with the jurors, to draw their minds away from the real issue, and to produce the impression that they were wretches whose lives were of no value to the community,

> and who were not entitled to the full benefit of the rules prescribed by law for the trial of human beings charged with crime involving the punishment of death. * * * However depraved in character, and however full of crime their past lives may have been, the defendants were entitled to be tried upon competent evidence, and only for the offense charged.''

This rule was again reiterated by the Supreme Court of the United States in

Hall v. U. S., 150 U. S. 76 (37 L. Ed. 1003).

(b) To this general rule there are various exceptions to the effect that where the identity of the accused is in doubt or where intent motive or guilty knowledge are elements of the offense, evidence otherwise competent may not be excluded bcause incidentally it indicates the commission of another offense.

We have no quarrel with the rule of law permitting such evidence in cases properly falling within the scope of these exceptions and for the purpose of this record we may concede that where the charge is unlawful possession of intoxicating liquor or the maintenance of a nuisance involving the possession of such liquor for the purpose of sale, evidence of other sales, evidence of unauthorized transportation of liquor, evidence of contraband articles employed in the manufacture of liquor, and even evidence of prior conviction for violation of the Prohibition Act might have been admissible, but we respectfully insist that where such evidence is admissible it must definitely tend to show the

commission of an offense or else a conviction supported by a proper record must be introduced in evidence. After a thorough search of authorities we have been unable to find a single Federal case or a single well-reasoned case elsewhere holding that evidence of mere prior *arrest* of a defendant is admissible for any purpose whatsoever.

In

Paris v. U. S. 260 Fed. 529 (C. C. A. 8th),

the court stating the general rule as above declares:

> "The general rule is that evidence of the admission by a defendant of an offense similar to that for the alleged commission of which he is on trial is not admissible to prove his commission of the latter offense. Boyd v. United States, 142 U. S. 454, 456, 457, 458, 12 Sup. Ct. 282, 35 L. Ed. 1077; Hall v. United States, 150 U. S. 76, 81, 14 Sup. Ct. 22, 37 L. Ed. 1003; 16 C. J. 586, P. 1132. To this general rule there are exceptions. One of them is that, where the criminal intent of the defendant is indispensable to the proof of the offense, proof of his commission of other like offenses at about the same time that he is charged with the commission of the offense for which he is on trial may be received to prove that his act or acts were not innocent or mistaken, but constitute an intentional violation of the law. In cases falling under such an exception to the rule, however, *it is essential to the admissibility of evidence of another distinct offense that the proof of the latter offense be plain, clear and conclusive.* Evidence of a vague and uncertain character regarding such an alleged offense is never admissible. Baxter v. State, 91 Ohio St. 167, 110 N. E. 456; State v. Hyde, 234 Mo. 200, 136 S. W. 316, Ann. Cas. 1912D, 191; 16 C. J. 592; People v. Sharp,

> 107 N. Y. 427, 469, 14 N. E. 319, 1 Am. St. Rep. 851; State v. La Page, 57 N. H. 245, 259, 24 Am. Rep. 69; Fish v. United States, 215 Fed. 545, 132 C. C. A. 56, L. R. A. 1915A, 809. Such evidence tends to draw the attention of the jury away from a consideration of the real issues on trial, to fasten it upon other questions, and to lead them unconsciously to render their verdicts in accordance with their views on false issues rather than on the true issues on trial. Speaking of evidence of other similar offenses, the Circuit Court of Appeals of the First Circuit, in the case last cited, well said: 'Evidence of this character necessitates the trial of matters collateral to the main issue, is exceedingly prejudicial, is subject to being misused, and should be received, if at all, only in a plain case'."

On this ground the judgment of the District Court where the defendants were convicted of unlawfully dealing in narcotics was reversed, because of the admission of evidence that they had been *arrested* for a similar offense in another district nine months before.

In

Hatchet v. United States, 293 Fed. 1010,

a similar rule is enunciated as follows:

> "The foregoing decisions are determinative of the question here. There was no issue as to appellant's identity; he did not testify, and yet the government was permitted to place before the jury evidence tending to show that he was a man with a criminal record. While there may have been, and probably was, competent evidence warranting conviction, it would be going far to say that appellant was not preju-

> diced by the admission of this incompetent evidence. He was entitled to a fair and impartial trial, and that he could not have, after it was made to appear, through the introduction of incompetent evidence, that his picture adorned the rogues' gallery, in connection with his *arrest* in Philadelphia for a similar offense; in other words that, with criminal propensities, he had operated elsewhere and under another name."

By implication this same rule is adopted by this court in

> *Hazelton v. United States,* 293 Fed. 384 (C. C. A. 9th),

where a judgment of conviction on the charge that the defendant had maintained a public place where moonshine whisky was sold was reversed because of admission of evidence of the conviction of the defendant in a police court for disorderly conduct. Speaking through Hunt, Circuit Judge, this court said:

> "Doubtless a record of prior *judgment* and a *plea of guilty* of having kept in June 1922 a place where intoxicating liquor was sold, would have been admissible against defendant upon the ground that such an offense was connected with the charge under investigation as part of a continuing offense * * *.
>
> For the reason therefore, that reception of the evidence conflicted with the firmly routed rule that the prosecution may not initially assail defendant's character, the judgment must be reversed and the cause remanded with directions to grant a new trial." (Our italics.)

In

Gart v. United States, 294 Fed. 66 (C. C. A. 8th),

where the defendant was charged with the unlawful possession and unlawful sale of narcotics, evidence was admitted that the defendant at a different time and place upon a street in Denver had delivered a package to another party. No further evidence was offered as to the nature of the contents of the package. In reversing the case, the court said:

> "It must be apparent that such a line of testimony, if not properly admissible, would be highly prejudicial. Standing as evidence before the jury it might easily lead them to the conclusion that the defendant was in the habit of making sales of narcotics on the streets by delivering packages containing the drug to persons indiscriminately, and yet there was no proof that the package so testified as having been delivered by the defendant at a time and place not charged in the indictment contained narcotic drugs. This left the matter in the nature of a mere suspicious circumstance, which not having been taken from the jury by the trial court left it with them for consideration.
>
> The scope and purpose of testimony concerning similar offenses is limited, as has been laid down in the Supreme Court of the United States in the cases of Boyd v. United States, 142 U. S. 454, 12 Sup. Ct. 292, 35 L. Ed. 1077, and Hall v. United States, 150 U. S. 76, 14 Sup. Ct. 22, 37 L. Ed. 1003. Only in exceptional cases is the proof of such transactions admissible. *Where a case falls within the exception, the proof must be clear and convincing.* It will be unnecessary to discuss the point in this case as to whether or not this line of testimony fell within the exception to the general rule governing the proof

> of similar offenses, for the reason that *in the case at bar we have no proof of an offense, but merely proof of a suspicious circumstance.*" (Our italics.)

and the court here repeats the language of Paris case quoted hereinabove at page 41.

In an analogous case,

United States v. Lindquist, 285 Fed. 447 (D. C. Wash.),

in connection with evidence of a prior offense the court said:

> "A statute providing for severer punishment on conviction for second offense is highly penal, and must be strictly construed. 16 Corp. Juris, 1339; 25 R. C. L. p. 1081. The second offense charged was not judicially determined until June 8, subsequent to the commission of all the offenses charged. The testimony, therefore, of this offense, relating to a separate and distinct offense, was prejudicial to the defendant Lindquist, tending to show that the defendant Lindquist was a bad man for which he was not on trial, and was not proper for the jury's consideration in determining the issue before it. People v. Fabian, 192 N. Y. 443, 85 N. E. 674, 18 L. R. A. (N. S.) 684, 127 Am. St. Rep. 917, 15 Ann. Cas. 100; State v. Findling, 123 Minn. 413, 144 N. W. 143, 49 L. R. A. (N. S.) 449."

In

Woods v. United States, 279 Fed. 706 (C. C. A. 4th),

in a trial arising under alleged violation of the Harrison Anti-Narcotic Act, the admission of evidence of an offer to compromise for a separate and distinct

offense was held reversible error, the court saying (p. 712):

> "What was done respecting this offer of compromise the record does not show. We think it related too remotely to the offense here charged to be admitted as an offense of guilt. We can but feel that this evidence tended to prejudice the defendant and should not have been brought into the case."

In

State v. Wheeler, 130 Pac. (Kans.) 656,

evidence of the prior *arrest* of the defendant and conviction of *other* defendants for another offense was held reversible error.

In

State v. Lyle, 118 S. E. (S. C.) 803,

the court says (p. 811):

> "It is also to be remembered in this connection that before guilty intent may be inferred from other similar crimes the extraneous crimes must be established by legal and competent evidence."

In

People v. Macijeuski, 128 N. E. (Ill.) 489,

the court says:

> "The testimony objected to tended to show that certain plaintiffs in error had been *arrested* for other crimes. Of course, this evidence was improper."

So in

People v. Bush, 133 N. E. (Ill.) 201,

the court said:

> "It was incompetent in this indirect way to prove that other criminal charges were pending against defendant and it was error for the court to permit it."

and the court has gone so far in Illinois as to hold that:

> "Even where proof of a former conviction is admissible it must be made by producing the record." (*People v. Reed,* 122 N. E. (Ill.) 806.)

So in

Allen v. State, 225 Pac. (Ariz.) 332,

it was held improper to inquire as to how many times a defendant had been previously searched, the number of times his place had been searched, and the number of times he had been arrested for violation of law.

So in

People v. Gordon, 204 N. Y. Supp. 184,

the court says:

> "Many of the questions propounded by the court as affecting the character and credibility of the defendants were incompetent, particularly inquiries concerning *prior arrests.*"

In

Baxter v. State, 110 N. E. (O. St.) 456,

the following is quoted from the syllabus prepared by the court:

> "Where evidence of other offenses of a similar character is competent to prove intent and the accused has not heretofore been convicted of such offenses the burden is on the State to prove that the accused is guilty of such other

offenses by the same degree of proof required in all criminal cases.''

See also

Lankford v. State, 248 S. W. (Tex.) 389;
Haley v. State, 209 S. W. (Tex.) 675;
Kellum v. State, 238 S. W. (Tex.) 940;
Corp. Juris., Vol. 16, p. 592.

(c) Applying the law enunciated by the above and numerous other cases to the instant case, it must be clear, first, that under no conceivable theory could testimony that the plaintiff in error had been *arrested* before be admissible. There is no word of evidence that he was ever convicted, there is no word of evidence as to the facts involved in connection therewith from which this jury could properly conclude that he had committed the prior offense, nor in the first part of the objectionable testimony is there even any specification as to the nature of the offenses for the alleged commission of which the prior *arrests* were made; nor finally does it appear whether they occurred one day or 50 years prior to the trial involved.

The ruling of the court that testimony concerning prior *offenses* was admissible was undoubtedly correct, in view of previous rulings in this court (*Strada v. U. S.,* 281 Fed. 143), but wholly inapplicable in view of the fact that only testimony as to prior *arrests* was offered. Considering the meagre state of the testimony as to this particular offense, even conceding for the moment that all of it was ad-

missible, no argument is necessary to show that the charge of the court in its instructions that the evidence of prior *arrests* could be considered by the jury as tending to show possession of liquor with the intent of sale was necessarily and inevitably prejudicial to this plaintiff in error.

It is true that no exception was taken to this part of the instruction. Nevertheless, the exception was properly taken to the testimony when offered for the first time. (Exception No. 3, Tr. p. 65.) This covered all subsequent testimony along the same lines without further objection.

Paris v. U. S., supra.

And covered the instruction to the jury without a separate exception being noted.

> "It is true as suggested by counsel for the Government that no exception was taken to the charge, but objection was made by the defendants to the evidence as to the Brinson, Mode and Hall robberies, and exception was duly taken to the action of the court in admitting it. That exception was not waived by a failure to except to the charge." (*Boyd v. U. S., supra.*)

VIII.

EVEN ASSUMING THAT ALL THE EVIDENCE BEFORE THE JURY WAS PROPERLY ADMITTED THERE WAS NOT SUFFICIENT EVIDENCE TO SUPPORT ITS VERDICT.

The first count in the information charges the maintenance of a nuisance involving the unlawful possession of intoxicating liquor for the purpose of

sale. In support of such a charge it is a rule in some circuits that a nuisance involves the idea of permanence and continuity of the offense.

United States v. Dowling, 278 Fed. 630;
Reynolds v. U. S., 282 Fed. 256 (C. C. A. 6th);
Hattner v. U. S., 393 Fed. 381 (C. C. A. 6th).

The weight of authority and the rule in this circuit, however, is to the contrary:

Parker v. United States, 289 Fed. 249;
Feigin v. United States, 279 Fed. 107;
Lewisohn v. United States, 281 Fed. 143.

We submit, however, that the farthest any of the above cases has gone is to hold that a single sale accompanied by circumstances of a habitual violation may support a verdict of guilty of a nuisance charge. In the instant case the only witness for the government, declared (Tr. p. 69):

"I saw no liquor being sold there"

and in the absence of proof of a single sale we submit that the charge of maintaining a nuisance is not supported by a shred of evidence.

As respects the charge of unlawful possession of intoxicating liquor, waiving for this particular purpose the contention that such evidence as was produced was illegally secured, we nevertheless submit that mere proof that intoxicating liquors were possessed and owned by the plaintiff in error in his private dwelling falls far short of proving him guilty of any criminal act. The law expressly provides (Sec. 33 of the Volstead Act), that the pos-

session of liquor in a private dwelling shall not be illegal. We maintain that such is the rule notwithstanding the presumption that arises from the mere possession of intoxicating liquor and the existence of the burden of proof created by Sec. 33 of the Volstead Act. In this connection see

United States v. Descy, 284 Fed. 724 (p. 726), where the court says:

> "It is apparent, of course, that upon the trial of the information the burden of proof and unlawful possession rests upon the United States and it is not sustained merely by proof of the finding of intoxicating liquors in the plaintiff's private dwelling, as there is no requirement that this liquor shall be reported or that a permit be secured. No presumption can arise against the possessor from the fact of possession alone to require of a defendant who appeals to the court to protect him against an unlawful invasion of his dwelling house and an unlawful seizure by officers acting in direct violation of the provisions of the National Prohibition Act in respect to search warrants. That he assume the burden of proof that his possession is not unlawful is very near to creating a presumption of guilt from proof of circumstances which are entirely consistent with innocence. Wholly to apply to defensive proceeding of this character the rule concerning the burden of proof contained in Sec. 33, in substance removes the presumption of innocence and imposes upon the defendant the burden of proving innocence in a proceeding which is incidental to a criminal complaint in which the burden of proof of guilt rests upon the United States."

In

U. S. v. Illig, 288 Fed. 937, 945,

the court says:

> "The pleader wholly ignores the fact that possession of intoxicating liquors is not made an offense under the 18th Amendment; that Congress did not attempt in the Volstead Act, nor would they have had the power to make the mere possession, stripped of every other act, a crime. Possession can be made an offense, only where prohibited for the purpose of making effective that which the amendment prohibited."

So also in

United States v. Cleveland, 281 Fed. 249,

where the court after a thorough analysis of the provisions of the act wherein the terms "action" and "prosecution" are used, comes to the conclusion that the clause imposing a burden of proof as respects lawful possession and acquisitions of intoxicating liquor applies only in a civil action concerning the same and does not apply in criminal prosecutions.

To the same effect is

United States v. Grossen, 264 Fed. 459,

where the court says:

> "It follows that the relator in the petition has established a prima facie right to own and possess liquor in the premises in question because she was not using the premises for the purpose of conducting the saloon, but they were occupied by her as her dwelling * * *.
>
> Sec. 3, prohibits possession 'except as authorized in this Act'. Sec. 33 contains one of the exceptions authorized. Congress has made the

exception applied to any one possessing liquor in a private dwelling while used and occupied by him (or her) as his (or her) dwelling only, * * *."

IX.

ADDITIONAL ERRORS.

In addition to the major errors hereinabove ~~in~~ and at length discussed, we desire briefly to refer to the remaining assignments of error and the exceptions covering the same.

Assignment of error No. 5, which is exception No. 4, relates to the refusal of the District Court to strike out the answer of the witness Rinckel. In response to the question:

> "Q. Why did you go there, Mr. Rinckel?
> A. I got reports there was a large amount of liquor."

That this is hearsay is obvious. That it is prejudicial is likewise apparent. Its effect was to indirectly and improperly give the jury to understand that there was liquor stored in the premises and that there were various people who were in a position to testify to that effect and that there was something improper in connection with the possession thereof.

X.

CONCLUSION.

We respectfully submit that the foregoing authorities and arguments definitely establish:

(1) That the premises located at No. 2933 Webster Street, the garage thereunder and the shed in rear thereof surrounded by a fence and within a common enclosure constituted a private dwelling, as said term is used in the Volstead Act.

(2) That the affidavit on which the search warrant was based was wholly defective as respects the shed, and as respects the garage it is based on hearsay, information and belief, and conclusions, and contains no single fact tending to show either that there was intoxicating liquor therein; that it was illegally possessed or that any sale was made therein.

(3) That as a result thereof no evidence obtained by virtue of the search under said warrant was admissible at the trial.

(4) That the property thus illegally seized must be returned.

(5) That excluding such evidence from the trial the jury had no evidence whatsoever before it on which to support any verdict of guilt on any charge.

(6) That the admission of evidence concerning prior *arrests* and the instructions referring to the same were improper and prejudicial.

(7) That in consequence the judgment of the court must be reversed.

In conclusion we would call the attention of the court to the fact that the plaintiff in error is now confined in jail undergoing and suffering the sen-

tence imposed upon him and therefore request a speedy determination of the case.

Dated, San Francisco,
October 22, 1924.

Respectfully submitted,
H. S. Young,
R. G. Hudson,
Frank T. O'Neill,
Preston & Duncan,
Attorneys for Plaintiff in Error.

B. F. Rabinowitz,
Of Counsel.